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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 997

HIDEYOSHI NAGAYAMA, *Petitioner,*

v.

SHOKUWAN SHIMABUKURO (JESSE S. SHIMA).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND SUPPORTING BRIEF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CASES CITED.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Hideyoshi Nagayama, by his attorneys, prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled cause on January 3, 1944, reversing the judgment of the District Court of the United States for the District of Columbia, entered on October 13, 1943 (R. 38).

OPINIONS BELOW.

This appeal was taken from the U. S. Court of Appeals for the District of Columbia since they reversed the verdict and judgment of the lower Court (R. 38). The trial court wrote no formal opinion and denied a motion for a new trial in its order (R. 40).

The opinion of the United States Court of Appeals for the District of Columbia (R. 125-128) is found in 78 App. D. C. —— Fed. (2d) —— (Adv. Sheets). A timely petition for a rehearing was denied by the United States Court of Appeals for the District of Columbia on March 9, 1944 (R. 134-135).

STATEMENT OF MATTER INVOLVED.

The petitioner, Hideyoshi Nagayama, filed a complaint in the District Court of the United States for the District of Columbia on August 24, 1939, in an action of debt, claiming that he had loaned money and extended credit to the respondent in the amount of $3,935.00 and the respondent had paid only a total of $320.00 on account. The respondent refused to pay the balance of said indebtedness and denied that he owed any money to the petitioner. The case was tried before three different juries and each verdict was for your petitioner. The first verdict (R. 23-24) was in the amount of $3,895.60. The respondent filed a motion for a new trial which was granted (R. 24-30). Your petitioner then retried this case before a new jury and was rendered a verdict in the amount of $3,743.15 (R. 30-31). The respondent filed a motion for a new trial (R. 31-33) and the court vacated the verdict and granted a new trial (R. 34). Your petitioner then tried this case before a third jury and received a verdict of $1,000.00 (R. 38). The respondent then filed a motion to vacate the verdict and grant the respondent a new trial for which the same was denied (R. 40). The respondent then appealed this case to the United States Court of Appeals for the District of Columbia, assigning several errors, none of which were sustained, but

the Court of Appeals, which admitted that there were issues of fact to be determined by the jury, (R. 125-128) reversed the Lower Court and remanded the case for a fourth new trial and set up, among other things, that the trial court did not properly instruct the jury and the Court of Appeals assigned this as an error in granting the respondent a new trial. There was no objection by the respondent to the instructions given by the trial judge nor was the instruction assigned as error, but was raised for the first time by the Appellate Court in their opinion (R. 127). This alleged error was not argued at the hearing, therefore, petitioner has not had an opportunity to defend against the same.

JUDICIAL STATEMENTS.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code which provided that Certiorari shall be granted:

> "In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States . . . to require certiorari . . . that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought here by unrestricted appeal."

The ruling of the Appellate Court denied the petitioner due process of law since the Appellate Court on its own motion reversed the Lower Court on a question of instruction to the jury when the instruction by the trial judge was not objected to by the respondent at the time the instruction was given and was, therefore, raised for the first time by the Appellate Court. In the case of the *Federal Trade Commission* v. *Algomal Company*, 291 U. S. 67 at page 73, the court said:

> "In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences."

We maintain that the questions involved are substantial since (1) Court of Appeals for the District of Columbia has rendered a decision in conflict with the decisions of other circuit courts of appeals on the same matter, and this Court of Appeals decision is in conflict with its own prior and subsequent decisions on the same matter; (2) and the Court of Appeals has decided the case not in accord with applicable decisions of this court.

Federal Rules of Civil Procedure Rule 51 states:

> "No party may assign as error the giving or the failure to give an instruction unless he objects before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

This decision nullifies Federal Rule 51 since there was no objection to the instruction of the trial judge. We also maintain that the rules of Court have the force of law and are binding on the courts as well as party litigants.

The judgment to be reviewed is the judgment of the United States Court of Appeals for the District of Columbia, entered on January 3, 1944 (R. 125-128). Timely petition for a rehearing was denied on March 9, 1944 (R. 134), thus, making it a final judgment for the purpose of this petition.

QUESTIONS PRESENTED.

1. Did the Lower Appellate Court err in raising a question of instruction of the trial judge for the first time after the case was presented on appeal when no objection to the instruction was made at the time of the trial?

2. Is it a violation of due process of law for an Appellate Court on its own motion to reverse a case on the grounds that an instruction was improper when no objection to the instruction was made at the trial of the case nor on the

appeal of the case, but was raised for the first time only by the Appellate Court and not by the respondent?

3. Is it a violation of due process of law for an Appellate Court not to give the proper effect to applicable decisions of the United States Supreme Court?

4. Is Federal Rule 51 of Civil Procedure nullified by this decision?

REASONS FOR THE ALLOWANCE OF WRIT OF CERTIORARI.

The case is in conflict with the other circuit court of appeals on the same matter. The decision is in direct conflict with the applicable local decisions.

This decision nullifies Federal Rule No. 51 of Civil Procedure which in substance requires exceptions to instructions be made before the jury retires.

This procedure established by the Appellate Court allows the said Court on its own motion to decide questions which have been decided by a jury and leads to endless litigation. It has long been the general rule of law that an Appellate Court will consider only such questions as were raised in the Lower Court. This rule is based on the considerations of the practical necessity in orderly administration of law and fairness to the court and the opposite party. Obviously, the ends of justice will be served by the avoidance of the delay and expense instant to appeals, reversals and new trials upon grounds of objection which might have obviated or corrected in the trial court if the question had been raised. There would be no assurance of any end to litigation if new objections could be raised on appeals. Whether a party has the option to object or not, if he sees fit, the failure to exercise the objections when the opportunity thereof presents itself must in fairness to the court and to the adverse party, be held either to constitute a waiver of the right to object or to raise an estoppel against the subsequent exercise thereof.

We further maintain that your petitioner was taken by

surprise when the Appellate Court raised a question of an improper instruction to the jury since your petitioner had no notice of the alleged error; and therefore, could not defend the same as the question was never raised in the lower court or by the respondent in the Appellate Court.

We, therefore, maintain that this court has held through a long line of decisions that a question cannot be raised for the first time in an Appellate Court if there was no objection in the Lower Court and to establish a precedent allowing an Appellate Court to do so would be denying your petitioner a due process of law under the Federal Constitution. The purpose of our law is to allow a jury to decide questions of fact. Thirty-six juries have passed on this question and now an Appellate Court on its own motion has by this case established a dangerous precedent which should be reversed by this Honorable Court.

WHEREFORE, your petitioner respectfully prays:

1. That this court issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia to certify and send to this court a full and complete transcript of the record herein, to the end that the cause may be reviewed and determined by this court as provided by law, that the judgment or order may be reversed with cost.

2. And for such other and further relief as may be appropriate.

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